

IN THE MATTER OF The Ontario Human Rights Code, S.O. 1981, Chapter 53, as amended, and in the matter of a complaint by the Ontario Human Rights Commission alleging a denial of equal treatment with respect to services and facilities without discrimination because ancestry, place of origin, ethnic origin, citizenship and family status, and thereby granting a preference in the provision of such services by Her Majesty The Queen in Right of Ontario, her servants and agents, The Ministry of Education.

INTERIM DECISION

PROFESSOR FREDERICK H. ZEMANS

Counsel for the Complainant
The Ontario Human Rights Commission

Ms. Anne M. Molloy

Counsel for the Respondent
The Ministry of Education

Mr. John P. Bell

The Complaint in this matter is brought by the Ontario Human Rights Commission (hereinafter referred to as the "Commission") against Her Majesty the Queen in Right of Ontario, her servants and agents, The Ministry of Education, (hereinafter referred to as the "Respondent"). The Commission alleges in the Complaint that the Respondent has contravened a provision of the Ontario Human Rights Code S.O. 1981, c.53 (hereinafter referred to as the "Code") in respect of persons identified by race, colour, citizenship, ancestry, place of origin, ethnic origin and family status.

This is an interim decision with respect to an application made by counsel for the Respondent requesting further particulars with respect to paragraph 5 of the Complaint. Specifically, the respondent has requested names of persons from whom complaints were received as referred to in paragraph 5 of the Complaint and the names of individuals who requested the Commission to initiate a complaint pursuant to section 31(2) of the Code. Paragraph 5 of the Complaint states:

5. The Ontario Human Rights Commission has been requested to initiate a complaint pursuant to Section 31(2) of the Human Rights Code, 1981, because of concerns that this policy of the Ministry of Education has discriminatory effect on some international students who on their own merits may be fully deserving of Ontario Scholarship recognition.

In their Demand for Particulars, the Respondent demands particulars of the complaint of the Ontario Human Rights

Commission, in part, as follows:

Particulars of the complaint filed No. 65-8505:

(i) pursuant to paragraph 5 of the complaint, particulars as to the person or persons who requested the Commission to initiate a complaint pursuant to Section 31(2) of the Human Rights Code 1981.

In their Reply to Demand for Particulars, the Commission replies, in part, as follows:

(a) The existence of any individual complaints concerning the Ontario Scholarship Program is irrelevant to this particular complaint and the particulars sought are therefore refused;

(b) (i) The identity of the person or persons who requested the Commission to initiate this complaint is irrelevant to the matters at issue in the complaint and the particulars sought are therefore refused.

As the Complaint in this matter has been initiated by the Commission, I have decided to write a brief decision discussing the right to particulars in these circumstances.

The leading case in Canada with respect to the content of a human rights complaint is Canadian Human Rights Commission v. Bell Canada (1981), 2 C.H.R.R. D/265 (Can. Human Rights Trib.) which held that a complaint must:

(i) Identify the Complainant, whether it is an individual person, a class, or the ...Commission itself;

(ii) Identify the victim or the class being discriminated against;

(iii) State the time during which the violation took place;

(iv) State the location of the alleged violation;

(v) State the nature of the discriminatory practice;

(vi) State the section and subsection upon which the discriminatory practice is based; and finally,

(vii) Contain an affirmation by the Complainant and/or the Commission that they have reasonable grounds to believe that the conduct constituted a discriminatory practice in violation of ... the Act.

Neither in the Ontario Code nor the Statutory Powers Procedure Act, R.S.O. 1980. c.484 (hereinafter referred to as the "Act") are there specific provisions about what information must be included in the complaint. However, section 8 of the Act provides:

Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

Ontario boards of inquiry have on numerous occasions expressed the view that full and frank disclosure before a hearing is desirable. (Keene, Human Rights in Ontario, 1983, Toronto: Carswell, 246-249). However, boards have also firmly maintained that neither the Code nor the Act provide for discovery in the sense that is usual with civil litigation. In Joseph v. North York General Hospital (1982), 3 C.H.R.R. D/854, Ian A. Hunter, Chairman discusses when particulars are appropriate and states:

Human rights cases have no pre-hearing pleadings: to inform themselves on the allegation and the issues, respondents must rely on the complaint form itself plus whatever particulars are furnished by the Commission or ordered by the Board.

The leading Ontario case with respect to particulars in civil proceedings is Fairbairn v. Sage (1925), 56 O.L.R. 462. At 470, Ferguson, J.A enumerates the purposes of particulars as

follows:

Particulars are, I think, ordered for several purposes:

- (1) to define the issue;
- (2) to prevent surprise;
- (3) to enable the parties to prepare for trial;
- (4) to facilitate the hearing.

The first reported case in Ontario with respect to particulars in human rights proceedings is Dubajic at al. v. Walbar Machine Products (1980), 1 C.H.R.R. D/288 (Ontario Board of Inquiry). In this decision Professor Gorsky discusses sections 6 and 8 of the Act. Counsel for the respondent Walbar had argued that the words "reasonable information" in s. 8 of the Act, should be given a very broad interpretation. Such an interpretation, it was suggested, should encompass a statement, not only of the material facts with respect to the allegations affecting the good character and propriety of conduct of Walbar, but, as well, the evidence by which such allegations were intended to be proved, along with the production of documents touching and concerning such allegations. Commission counsel argued that the disclosure of the names of such person would amount to a disclosure of evidence. Professor Gorsky stated (at p.D/229):

I cannot see how such disclosure can be considered as evidence of the way "...in which (the Commission) is going to make out (its) case." (Cook v. Cook, (1947) O.R. 287, at p.291, per Gale J.) In the latter case Gale J., (as he then was), in distinguishing questions relating to eliciting fact from those seeking evidence, concluded that a party was not entitled to discover how his opponent proposed to prove his case. In ordering the furnishing of such material facts I am not ordering the furnishing of the names of witnesses alone. Even if this was the case, where information as to the identity of a witness is being sought, the rule that such

information is not obtainable is subject to an exception: "where...those names form a substantial part of the facts material to the issue ..." (Permanent Mortgage Corp. v. Gostick (1932), 41 O.W.N. 169 per Grant, J.A.)

Another case which has been relied upon in numerous Ontario decisions with respect to particulars is Marriott v. Chamberlain (1886), 17 Q.B.D. 154, where Fry, L.J. said at p.166:

...although one party cannot compel the other to disclose the names of his witnesses as such, yet, if the name of a person is a relevant fact in the case, the right that would otherwise exist to information with regard to such fact is displaced by the assertion that such information involves the disclosure of the name of a witness... I think that the law still is as there laid down, and the mere circumstance that in making discovery of relevant facts the names of witnesses must be disclosed is not sufficient to take away the right to discovery.

Professor Gorsky summarized Marriott in Dubajic, as follows:

In ruling on the right to disclosure of the names of persons unnamed but referred to in the Complainants I will consider:

(a) If the disclosure will result in identifying Commission witnesses whose identity does not "form a substantial part of the facts material to the issues". (Permanent Mortgage Corp v. Gostick, supra.)

(b) Whether knowledge of the names of the persons referred to is reasonably necessary in order that Walbar may have sufficient information about the allegations relating to its good character or propriety of conduct, so as to enable it to prepare to meet such allegations.

My view of s.8 of the Act is that it was introduced to regulate one aspect of procedural natural justice which must be followed by certain tribunals including a Board of Inquiry pursuant to s.14 (a) (1) of the Code. Whatever the scope of the information which must be furnished, its purpose is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing.... Such material facts should include

when and where the alleged acts, which raised the issues, occurred, as well as the names of such persons who are referred to in the allegations, subject to the exceptions above noted.

The Ontario case law would seem to be clear that:

1. The Complaint must contain all the "essential elements", including identification of the Complainant and the victim or the class being discriminated.

2. The Respondent must be aware of all matters which form a "substantial part of the facts material to the issues". Evidence in support of those facts needs not be divulged.

3. The Respondent must be provided with sufficient information to allow it to prepare to meet all the allegations against it.

In applying the law as it has developed with respect to particulars to the Complaint in this matter, I have no doubt that the Complaint prepared by the Commission provides the "essential elements" required by the Bell decision discussed earlier. As well, the Respondent by virtue of the Complaint and the particulars delivered is aware of matters which form a "substantial part of the facts material to the issues" involved in this Complaint.

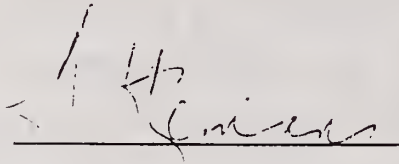
In considering this matter it appears to me that paragraph 6 and 7 of the Complaint, as well as the fact that the Complaint was initiated by the Commission, indicates clearly that the Complaint is based on the Commission's belief that the Code has been contravened by the Respondent by adopting, implementing and continuing a particular policy which, in the Commission's

opinion, denies certain students in Ontario the right to equal treatment with respect to services and facilities without discrimination because of the student's ancestry, place of origin, ethnic origin, citizenship and family status. In the circumstances of this Complaint, I fail to see how the process by which the Commission came to the decision to lay and to proceed with this Complaint is a material fact or on what basis the provision of the name or names of the person or persons who requested the Commission to initiate the Complaint is material or for that matter, necessary to allow the Respondent to prepare for the hearing.

I therefore hold that further particulars with respect to paragraph 5 of the Complaint are inappropriate and need not be delivered by the Commission. If the Respondent should suffer potential prejudice at the hearing through the introduction of issues by the Commission which could not have been reasonably anticipated such prejudice may be avoided through timely adjournment pursuant to section 21 of the Act. (Beceau v. Ontario Institute for Studies in Education (1982), 3 C.H.R.R. D/874).

I therefore dismiss the Respondent's application for Particulars and order that the Hearing in this matter should commence on December 15th, 1986 at 10:00 A.M.

Dated at Toronto, this 24th day of November 1986.

A handwritten signature in dark ink, appearing to read 'F. H. Zemans', is written over a horizontal line.

Frederick H. Zemans,
Board of Inquiry.